

SIR JOHN FORTESCUE AND THE LAW OF NATURE

BY

EDGAR WILSON LACY
A.B., Vanderbilt University, 1936
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AN ABSTRACT OF A THESIS

SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE OF DOCTOR OF PHILOSOPHY IN
ENGLISH IN THE GRADUATE SCHOOL OF
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SIR JOHN FORTESCUE AND THE LAW OF NATURE

A study of Sir John Fortescue and the Law of Nature involves a consideration of the relation of this fifteenth-century English writer to the tradition of philosophical thought which gives rise to this concept. The idea of the Law of Nature, in its broadest sense, subsumes man's attempts to find a rational principle by which particulars are so ordered that each fulfills its proper function as a part of the whole. With reference to man's activity itself this concept becomes a standard of values, a system of universals, underlying man's relation to his ultimate end and his relation to his fellow men in society. The laws which he sets up to govern his actions should reflect this universally valid order revealed to him by his reason.

As an outgrowth of the attempts of the early Greek thinkers — the Pythagoreans, Empedocles, Heraclitus, and Anaxagoras — to identify a principle lying behind the disposition of individual phenomena, Socrates, Plato, and Aristotle define the relation of this universal principle to human conduct. Socrates states that there is a ruling intelligence which gives order to all things; the wise and virtuous man must have a knowledge of the universal moral laws to which human laws are to conform. According to Plato principles of justice are inherent in the universal natural law. Basically justice implies a rectitude of order in the interior dispositions of a man. That virtue which operates internally in preserving the harmony in the workings of the soul of the other virtues (sobriety, courage, and intelligence) is to be identified with justice which operates externally to maintain the proper interaction in the state of the parallel division (artisan, soldier, and philosopher, respectively); this justice is the principle of performing one's own function. For Aristotle the universe is ordered by the law, and law is identified with reason. There is a universal, unwritten law, the Law of Nature, which embodies the principle of right and wrong, that is, justice, as set over against the law which each state makes to satisfy its immediate needs. Justice, as the whole of virtue, is to be identified with that fundamental purpose of law which is to prescribe the conduct of each individual. Justice in the particular sense has to do with the regulation of the due owed to each individual in the commonality according to distributive and corrective justice.

This basic conception, developed in Greek thought by the time of Aristotle, becomes formalized into a tradition of thought whose elements are given significant expression in similar, though not identical, terms by thinkers in the Greco-Roman and medieval periods: there is an unwritten law functioning in a rationally ordered universe and furnishing a standard for human conduct; in harmony with this law, known to man through

his reason, the rectitude of order both of the individual and of the commonalty is to be maintained.

Yet there are thinkers in the Greek, Roman, and medieval periods who fail to adhere to this tradition in their consideration of the problem of human conduct; for they reject the doctrine of the organic relationship of man's activity to a universal standard of values. The Sophists regard human laws as the product of convention; under natural law right consists in might. The universal law, as conceived by the Epicureans, has no significance as a standard for governing society; since natural justice is but a symbol or expression of expediency, agreements are made in a commonalty purely on the basis of mutual interest and protection.

Basic to the Stoic philosophy is the conception of a universal law, identified with divine reason, which orders all particulars. This law serves as the standard of justice according to which human conduct and relationships are to be patterned; Cicero in particular stresses the fact that the laws governing society must reflect the universal principle of justice as set over against mutable, conventional ends. But the significant Stoic contribution to the Law of Nature tradition is the emphasis placed on the individual's relation to the universal law; man is to follow nature — both the universal nature and his own. Since through his reason he knows the set of values embodied in the Law of Nature, each individual human being is to develop his own nature so as to live and act in harmony with the orderly process of the universe. An unjust act is a deviation from nature and hence is destructive of the universal order in which all individuals participate; consequently as a member of society each individual is to help all other individuals, as integrally related to the universal order, to follow nature. Thus the Stoics emphasize the relation of the individual to the universal law; but the ultimate significance of this law functioning in a rationally ordered universe and furnishing a standard for human conduct is identical with that conception developed by Plato and Aristotle.

The concept of a universal law lying behind all other laws came to be one commonly used by the Roman lawyers and the medieval civilians. They distinguish between the Law of Nature (*jus naturale*), that law whereby all living creatures fulfill their natural functions, and *jus gentium*, that law which is known to rational beings alone and embodies the principles of justice. *Jus naturale* is valid everywhere; human laws have significance only in relation to the individual states. The basic conception of the Law of Nature, identified with the Law of God, as embodying the principle of universal order and furnishing the standard for moral conduct is generally expressed by the Church Fathers and the medieval canonists. Thus for the Roman lawyers, the Church Fathers, and the

medieval civilians and canonists the Law of Nature has the same intrinsic meaning as that given to it by Plato, Aristotle, and the Stoics.

In the period between the time of the Roman and patristic thinkers and the time of Thomas Aquinas we may turn to Boethius and such medieval writers as Anselm, John of Salisbury, and Bracton for evidence of the continuity of this tradition; for in their statement of the idea that all particulars are ordered in accordance with a universal principle, the Law of Nature retains the fundamental significance it had in the body of Greek, Roman, and patristic thought. Boethius and Anselm, like the Stoics, stress the relation of the individual to the universal law, which is identified with God: according to Boethius, man through his reason is to live in harmony with that order manifested in universal law, Providence, or divine reason; according to Anselm, man, who through his reason discerns justice, is to live in harmony with the order of the universe and thus render God his due. John of Salisbury emphasizes the relation both of the individual and of the commonalty to the universal law. The individual must act in accordance with the light of reason and thereby follow the law written in his heart even to the extent of taking overt action against the tyrant; the relations of men gathered together in society must be regulated justly according to the equity of natural law. For Bracton, who gives the distinction made by the Roman lawyers between the Law of Nature, *jus gentium*, and civil law, justice is the universal principle by which all things are ordered and in accordance with which man renders to each his due.

The elements of this philosophical tradition which had retained the same intrinsic meaning in the minds of Greek, Roman, patristic, and earlier medieval thinkers receive from Thomas Aquinas a clear and definitive expression in his systematic presentation of a hierarchy of law. The law whereby divine reason governs the universe is the Eternal Law which directs all created things to their end. Man moves himself towards the end in harmony with his rational nature; in his relations with others, as individuals or as the whole composed of individual parts, he acts according to justice, which is but reason putting its order into operations. Justice, then, implies a right order in man's acts. This rectitude of order rationally perceived forms the pattern for those laws, derived from the Law of Nature, which govern individuals gathered together in a commonalty. Human laws, in making for tranquillity and order, are directed to the common good of all the individual parts. Finally, in this universe ordered by Eternal Law, Divine Law leads man to his ultimate end, eternal happiness.

Later thinkers who adhere to the intrinsic meaning of the Law of Nature are of necessity to some extent influenced by the systematic form

in which this tradition was crystallized by Aquinas. Thus Aegidius Romanus, a follower of St. Thomas, in the main repeats the philosophical elements of the tradition as they are found in his master.

However, such men as Marsilius of Padua, William of Occam, and Reginald Pecock do not give to these elements that full hierarchical treatment found in Aquinas. Marsilius places emphasis on the binding quality of human law rather than on its relation to a universal law. This tendency to stress the idea that the validity of law depends on its coercive character harkens back to the Sophistic and Epicurean accentuation of the conventional nature of law. William of Occam, on the other hand, while not giving a full development of the hierarchy of law, considers the Law of Nature as embodying precepts which bind human laws and individuals; hence he more nearly evidences the traditional conception than Marsilius does. Pecock does not refer to a hierarchy of law, but the universal law has the same intrinsic value for him as it had retained in the earlier expression of the tradition. There is a Law of Nature, the moral law of kind, which is known to man through his reason and by which he is to guide his conduct; validity of the knowledge of the precepts of the Law of Nature thus derived is made firm through the fact that others have reached the same conclusion.

Throughout this development of the Law of Nature tradition, then, the elements have been variously emphasized and treated, but their ultimate significance has retained a firm place in the body of Greek, Roman, and medieval thought. Certain thinkers — especially the Sophists and the Epicureans, and to a lesser extent Marsilius of Padua — have stressed the conventional nature of human law rather than its relation to a universal law. But the intrinsic meaning of the concept of the Law of Nature has been given expression in similar terms by the thinkers in the Greek and Roman period and by thinkers in the early and late medieval period up to the time of Fortescue.

The elements of the Law of Nature tradition are expressed by Fortescue through reference to a hierarchy of law. All particulars in the universe are ordered by Eternal Law, which is divine reason or Providence. Through his rational participation in this universal order man has a natural inclination to right action, though his will is not predetermined; that is to say, the Law of Nature, the truth of justice revealed by right reason, furnishes a standard for human conduct. The Law of Nature and human law, which is valid only if it does not contradict the principle of justice embodied in the Law of Nature, leads man to virtue. Divine Law leads man to beatitude. In harmony with the Law of Nature the rectitude of order both of the individual and of the commonalty is to be

maintained; an inordinate act is an aberration from the universal order consonant with the hierarchy of law.

In this tradition of thought whose elements remain fundamentally the same in their basic significance, the conception of the origin of formalized society and its institutions is not uniform. In contrast to the Sophistic doctrine of conventional origin, Plato and Aristotle state that society is natural in as much as man is by nature a social animal. For Aristotle the institutions of slavery and private property have a basis in nature. But the Stoics say that since all men are brothers through their sharing in universal reason, inequality among men is unnatural. The Stoics in general accept the Aristotelian conception of society as furnishing that order of law and justice necessary to natural human life. But Seneca presents a contrast between the original state of nature, the "age of gold," in which all men dwelt together happily, held possessions in common, and needed no coercive government with that state of affairs which developed when corruption entered and made laws necessary; the state, or formalized society, is necessary as a remedy for the corruption of human nature. This conception of the penal and remedial character of formalized society and its institutions, made necessary as the result of original sin, came to be the normal medieval doctrine; it is stated by the Church Fathers and the medieval civilians and canonists. But as a result of the rediscovery of the Aristotelian philosophy in the thirteenth century Aquinas states that it is natural for man to live in society so as to attain that end established by reason, his directive force; for the group to exist and endure, there must be a governing power by which it is regulated for the common good. Aquinas discards the predominant medieval conception that formalized society is an outgrowth of original sin; but he does not reject the doctrine that the coercive element of that governing power essential to the existence of formalized society is the result of sin. According to Aquinas, slavery and private property are additions to the Law of Nature, but are not contrary to it, in as much as they are devised by human reason for the benefit of human life.

Fortescue follows the conception, emphasized by Aristotle and made known to the medieval mind by Aquinas, that formalized society is natural in as much as man is by nature a social and political animal. But as the basis for the idea that the existence and endurance of this society depends upon its being ordered by some governing power, Fortescue gives two reasons: the principle of order necessitates that all parts of the whole be subordinated to one who is to maintain the proper relationship between these parts; man's corrupted nature makes him prone to act inordinately. Order by definition imports inequality, for in an orderly disposition of things one must of necessity be placed over another. Prelacy over the

world, divinely bestowed at the time of creation, is an inherent and indelible part of human nature. But the dominion which man exercises over man, Fortescue, following Aquinas, states, is of two kinds: dominion as ruling over a slave; dominion as guiding free men to their own good or to the common good. The first kind was introduced by sin and did not exist in the state of innocence; the second kind is natural. But for dominion to be effective there must be a power of punishment, and this power is the result of original sin. Like Aquinas, then, Fortescue does not contradict the doctrine that the coercive element of dominion results from sin; but formalized society itself and the principle of order under a governing power, essential to the existence of that society, is natural. The possession of private property, however, is an outgrowth of sin. Divinely condemned to earn his bread after the fall, man has a right to the product of his own labors. Property did not belong to man possessed of his original nature, but it accrues to him now in accordance with the Law of Nature. Man's nature, not the Law of Nature, has changed, for by that law all things were held in common in the state of innocence. The coercive element of dominion and the possession of private property, then, are penal in origin, but they are also remedial.

The elements of the Law of Nature tradition find expression, then, in Fortescue: the universe is ordered in harmony with a hierarchy of law; in accordance with the Law of Nature which embodies the principle of justice revealed to man through his reason the rectitude of order both of the individual and of the commonalty is to be maintained. These basic ideas furnish the philosophical background and framework for his treatment of particular questions having contemporary and practical significance. Consideration of the question of the relative merits of the Lancastrian and Yorkist claims to the throne of England is based on an explicit use of the Law of Nature. In the discussion of mixed dominion, in *De Laudibus Legum Angliae*, in *The Governance of England*, and in "A Dialogue between Understanding and Faith," the elements of the Law of Nature tradition form the implicit philosophical framework.

In the consideration of the question of royal succession the Law of Nature is significant, not so much as being an ethical standard, but as representing that principle of order in accordance with which all particulars of the universe are duly regulated; order is conceived as that disposition of equal and unequal things whereby each is assigned its proper place. In *De Natura Legis Naturae*, Fortescue endeavors to demonstrate the point that the manner of royal succession must remain in harmony with the orderly process of the universe. Since woman is naturally inferior to man and is subjected to his dominion by the Law of Nature, she

cannot rule a kingdom which acknowledges no superior; hence, in as much as the Yorkist claim to the English throne is based on hereditary succession through a woman (Philippa, granddaughter of Edward III), it is inordinate and therefore invalid. In his short tracts on the question of succession, Fortescue cites historical examples of women who have been excluded from inheriting, or being the means of inheriting, thrones of kingdoms. That is to say, these exclusions seem to validate what the discourse of reason has revealed in the *De Natura Legis Naturae* as being the judgment of the Law of Nature on the question of royal succession; other people living in other times have excluded women from inheriting thrones on the basis that such an act would be unjust and would be detrimental to the universal rectitude of order. In "The Declaration" Fortescue in effect refutes the Lancastrian claims which he had supported in the earlier writings on the question of succession. The historical examples he had cited in the tracts as substantiations of the conclusion of *De Natura Legis Naturae* he discusses one by one to show that they in themselves are false; since presenting these examples he has acquired factual evidence which disproves them. In treating the question of woman's right to rule a kingdom which acknowledges no superior, Fortescue states that every woman in a Christian kingdom is under the power of a man — the pope. Furthermore, since every Christian ruler is subject to the pope, there is no realm whose king acknowledges no superior; hence the earlier statement of the problem of succession involved a logical contradiction.

Thus, wanting to justify the Lancastrian succession, Fortescue turns, in *De Natura Legis Naturae*, to the Law of Nature tradition for the principle that in an orderly universe the less cannot be over the greater. This, as we have seen, is a principle which he never denies; for in "The Declaration" he changes the nature of the original question by saying that there is no ruler who recognizes no superior. The fact that this is a sophistic quibble does not invalidate the sincerity of his explicit use of the Law of Nature in *De Natura Legis Naturae*. But it is indicative of the significance of this use; to Fortescue the concept of the Law of Nature is a means of giving a firm basis for the established order. At the time of the writing of "The Declaration," he realizes that in his defense of the Lancastrian succession he had been reasoning as a "parcyall man": in *De Natura Legis Naturae* his syllogism was faulty and hence his individual discourse of reason had misapplied the judgment of the Law of Nature, that truth of justice revealed by right reason; in the tracts on the succession his examples, which seemingly substantiated the conclusion reached in *De Natura Legis Naturae*, were based on imperfect knowledge of positive facts. Hence only through error of his own individual reason

was the Law of Nature used to justify the Lancastrian succession; that is to say, the Law of Nature cannot be used to invalidate the established order under Edward IV.

The maintenance of that order whereby each man receives his due in accordance with justice as embodied in the Law of Nature is the basic function of the commonalty; this is the conception which forms the philosophical background for the doctrine of mixed dominion which Fortescue discusses in his three major writings, *De Natura Legis Naturae*, *De Laudibus Legum Angliae*, and *The Governance of England*. To understand the meaning of his statement of dominion — that governing power is essential to the existence of formalized society — emphasis must be placed on the fact that under *dominium politicum et regale* the king is less likely to become a tyrant, not because there is any coercive parliamentary control over him, but because he does not act according to his own will; the king is to pattern his action, not solely on the basis of his own discourse of reason, but on the basis of that truth of justice revealed, on the one hand, by the discourse of reason reflected in the counsel of many, and, on the other hand, by the discourse of reason embodied in human laws. That is to say, Fortescue's statement of dominion must be considered, not in the light of constitutional developments of succeeding centuries, but in the light of elements of the Law of Nature tradition. *Dominium politicum et regale*, as opposed to *dominium regale*, is to be praised as the form of rule which is more likely to maintain that rectitude of order whereby each member of the commonalty will receive his just due; the ruler, by rendering to his subjects the due which is theirs, will not destroy his own individual rectitude of order.

The relation of justice — that principle embodied in the Law of Nature in accordance with which is to be maintained the rectitude of order both of the commonalty and of the individual — to the prince both as a ruler and as an individual forms the philosophical framework for Fortescue's discussion of the laws of England in *De Laudibus Legum Angliae*. Human laws are to be defined as rules whereby the perfect notion of justice can be determined. Through a study of human laws the prince will be able to govern justly as a ruler; as an individual by knowing justice in this manner he will be able to maintain his own rectitude of order and consequently achieve happiness. The burden of *De Laudibus Legum Angliae* is to establish English Law, and not civil law, as that set of human laws which the prince is to study so that he may both rule justly and attain that happiness based on a knowledge of justice.

In *The Governance of England*, Fortescue considers the question of strengthening the administrative office through practical means. But the

discussion both of the necessity for doing this and of the manner in which it is to be accomplished is based on that principle of justice embodied in the Law of Nature. For it is necessary to endow the royal office adequately so that the king can always be efficient in performing his royal duty of maintaining the rectitude of order; the manner in which this endowment is to be effected — through the resumption and inalienable retention of royal lands and through the formation of a council to assist in the accomplishment of this purpose and to work generally for the benefit of the common good — is always considered in the light of that principle whereby each individual in the commonalty will receive his just due. Later historical developments prove that the carrying out of these administrative proposals would have resulted in making the ruler so independent that there would have been no practical means of preventing him from acting inordinately; but the intent of these proposals is not Machiavellian. The explicit end for which they are the means is, not to enable the ruler to maintain his position according to the expedient standard of a practical world, but to make the ruler efficient in maintaining the rectitude of order in the commonalty according to abstract right.

In "A Dialogue between Understanding and Faith" the philosophical background is furnished by the whole hierarchy of law, with the emphasis placed on justice according to Divine Law in an ordered universe. Those who act contrary to the precepts of the Law of Nature and escape the retribution which should have been exacted through the machinery of human laws have nevertheless destroyed their own rectitude of order and must ultimately be judged by divine justice. But the destruction of the rectitude of order in society at a given time does not mean that it will never be restored. In an ordered universe evil may be used as a means to a good end.

Living in an age of unrest and strife Fortescue stands out as a conservative thinker utilizing an accepted tradition of thought to give the established order a firm philosophical basis. Fortescue's explicit use of the principle drawn from the Law of Nature tradition — that in an orderly universe the less cannot be over the greater — is to justify the established order of royal succession. That he had misapplied the judgment of the Law of Nature tradition to defend the Lancastrian order was the unfortunate error of his individual discourse of reason. The significance of the implicit pattern furnished by the elements of the Law of Nature tradition for Fortescue's political and philosophical thought is the justification of the established order through the subordination of the individual discourse of reason to that judgment overtly recognized. In his statement of *dominium politicum et regale*, emphasis is placed on the idea that the

ruler is to pattern his action, not solely on the basis of his own discourse of reason, but on the basis of that truth of justice revealed, on the one hand, by the discourse of reason reflected in the counsel of many and, on the other hand, by the discourse of reason embodied in human laws; thereby he is less likely to become a tyrant and disrupt the established order. The ruler is to act royally, that is, pattern his action on the judgment of his own individual reason, only in those instances where explicit provisions for maintaining the established order have not been made. In *De Laudibus Legum Angliae* the underlying philosophical framework is the principle that for the prince to maintain the rectitude of order of the commonalty and to achieve that individual happiness which is the product of his own rectitude of order, he must study the established laws and customs of England for a knowledge of justice. That is to say, the truth of justice revealed by individual reason is subordinated to that justice revealed in the customs and laws of the established order. Thus the antiquity of English customs is a proof in itself of their justness; if they had been unjust they would have been changed sometime in the past. Hence man's conduct in society is not based on his individual discourse of reason alone; for the explicit and recognized custom and law, in as much as they are intended to reflect the truth of justice embodied in the Law of Nature, act as a guide or standard which must not, and cannot be, rejected. The rectitude of order which the king will be able to maintain more efficiently on the basis of the administrative proposals in *The Governance of England* coincides with the established order. By being able to exert his authority over recalcitrant nobles and to quell riots, the king will be able to uphold the established system; the commons, secure in their possessions, will not revolt against that system. The significance of the personal philosophy stated in "A Dialogue between Understanding and Faith" is that, regardless of the individual's discourse of reason as to how far the established order reflects the truth of justice revealed by right reason, he must be satisfied with his own rectitude of order; confident in his knowledge that ultimate justice will be rendered according to Divine Law, he must endure injustice here. This, then, is Fortescue's conception of human conduct based on knowledge revealed through the hierarchy of laws, but especially human laws.

In using these elements of the Law of Nature tradition to give to the established order a firm philosophical basis, Fortescue has a significant place in English thought. Unlike John of Salisbury and Reginald Pecock, who had emphasized the importance of the individual reason as set over against established and revealed judgment, Fortescue places himself in that conservative tradition of English thought which was to include a

similar expression by Christopher St. German and Richard Hooker in the sixteenth century. Like Fortescue, St. German turns to the hierarchy of law to give to the established order a solid foundation; to this order and its recognized customs, the judgment of the individual discourse of reason is subordinated. On the basis of a presentation of elements of the Law of Nature tradition, Hooker defends the established order by subordinating the judgment of the individual reason to that judgment revealed in human laws and customs as a reflection of the whole hierarchy of law. In refuting the Puritan doctrine that the Divine Law stated in the Scripture is the only overt standard for human conduct, Hooker emphasizes the idea that every law must be considered in its relation to the whole hierarchy. Actually the Puritans do not refer to Divine Law, but to their private interpretation of it. The individual discourse of reason can discover a standard of right conduct; but the most certain ethical guide is that general persuasion of all men formalized in the long established human customs and laws which have an integral relation to the whole hierarchy of law.

Fortescue, then, evidences the continuity of an accepted tradition of thought — the Law of Nature tradition. His use of this tradition which furnishes the philosophical framework for his writings is that of a conservative thinker.

VITA

Edgar Wilson Lacy was born in Lexington, Kentucky, February 18, 1914, and received his early schooling in the South. He was graduated from Vanderbilt University in 1936; holding a graduate scholarship he received his A.M. from Vanderbilt the following year. During the academic years 1937-1938 and 1938-1939 he has been a Fellow in English at the University of Illinois. He is a member of Phi Beta Kappa and Phi Kappa Phi.

